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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 706

REPORTING REQUIREMENTS FOR
POSITIVE TRAIN CONTROL EXPENSES AND INVESTMENTS

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Pursuant to the Board's Notice of Proposed Rulemaking served October 13, 2011 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits its reply comments on the Board's proposal to adopt reporting requirements for capital investments and operating expenses associated with positive train control ("PTC").[1] Specifically, UP's reply responds to the comments filed in opposition to the NPRM by the American Chemistry Council and the Chlorine Institute (collectively "ACC/CI") on December 12, 2011.

In its Opening Comments, UP strongly supported the Board's proposal to adopt new reporting requirements for PTC expenditures and suggested only minor modifications. ACC/CI's comments in opposition to the Board's proposal offer no valid reason for the Board to refrain from adopting new reporting requirements for capital investments and operating expenses associated with PTC. ACC/CI's comments do not contain any substantive arguments that the Board has not already addressed and correctly rejected. UP, therefore, urges the Board to adopt the new reporting requirements for PTC expenditures with the minor modifications proposed by UP and promptly amend its reporting rules.

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[1] UP also joins in the reply comments submitted by the Association of American Railroads.

SUMMARY OF ARGUMENT

ACC/CI present three arguments as to why the Board should not adopt the proposed PTC supplemental schedules to the R-1 annual report ("R-1"). *First,* ACC/CI claim that the Board's proposal does not provide "sufficient guidance about which PTC-related costs may be recorded, and how they should be recorded" and that this lack of guidance "give[s] each railroad carte blanche to record whatever expenses it wishes, in the manner each one thinks best." (ACC/CI Comments at 4-5.) The Board itself addressed ACC/CI's claim in the NPRM by pointing out that the R-1 annual reports are independently audited and that the Board actively monitors the auditor's reports and can take action if a railroad misreports expenses as PTC related. (NPRM at 5 n.9.)

Second, ACC/CI criticize the Board's proposal for not requiring reporting of PTC benefits. (ACC/CI Comments at 6.) As noted by the Board, while railroads are currently incurring measurable costs to install PTC, any benefits that may arise from implementing PTC will occur only after the implementation deadline. (NPRM at 5.) Furthermore, it is questionable whether railroads will realize PTC benefits after implementation and even the types of PTC benefits that railroads might realize are speculative.[2] ACC/CI's vague suggestion about somehow "teas[ing] out productivity gains attributable to PTC"[3] is quite different from the Board's straightforward proposal for incremental changes to existing R-1 schedules to capture actual PTC expenditures. The Board should not prolong this proceeding so that parties can attempt to develop an accurate method for identifying, measuring, and reporting PTC benefits

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[2] *See* Federal Railroad Administration, Docket No. FRA-2008-0132, Notice No. 3, *Final Rule: Positive Train Control Systems, 49 CFR Parts 229, 234, 235 and 236*, 75 Fed. Reg. 2,598, 2,684 (Jan. 15, 2010).

[3] ACC/CI Comments, Verified Statement of Thomas D. Crowley, et al. at 15.

that will not occur, if ever, until after PTC is implemented, and thus potentially miss the opportunity to capture PTC costs currently being incurred.

Third, ACC/CI claim that the reporting of PTC costs will "serve mainly as a pretext for railroad efforts to recover (or over-recover) their PTC costs from shippers." (ACC/CI Comments at 1.) ACC/CI's claims are baseless and focus on the wrong issue: how the PTC cost data will be used. In UP's Petition for Rulemaking ("Petition"), UP did not ask the Board to decide whether or how to use the PTC cost data. (Petition at 3.) Likewise, the Board clearly stated that it was not proposing, at this time, any change in how costs are currently assigned in rate and other proceedings. (NPRM at 4.) Consequently, questions about how the PTC cost data are used in Board proceedings should be addressed in separate cases or proceedings, and interested parties will have an opportunity to raise issues regarding the use of the information with the Board at that time.

ARGUMENT

I. EXISTING R-1 AUDITING REQUIREMENTS WILL ENSURE ACCURATE REPORTING OF PTC COST DATA.

ACC/CI's allegation that railroads would or could misreport PTC information is baseless. ACC/CI do not even address the current accounting and regulatory controls on the R-1, much less provide any evidence that the controls are insufficient to prevent misreporting of PTC information.

ACC/CI's claim ignores existing R-1 auditing requirements that test the accuracy of the data reported and confirm compliance with the Uniform System of Accounts for Railroad Companies. As provided in *Certification of Railroad Annual Report R-1 by Independent Accountant*, 1 I.C.C.2d 902 (1985), the R-1 is subject to review by Agreed Upon Procedures established by the Board and independent public accountants. Independent public accountants review the R-1 in accordance with attestation standards established by the American Institute of Certified Public Accountants, and issue a report, subject to review and approval by the Board. *Certification of R.R. Annual Report R-1 by Indep. Accountant* at 902, 904-05; *Adoption of the R.R. Accounting Principles Board's Recommendation of Its Data Integrity Principle in Reports Prepared Using Agreed-Upon Procedures*, 4 I.C.C.2d 818, 819 (1988). The accountant's report states the specified data examined, using the Agreed Upon Procedures, and the data found to be in compliance with the Uniform System of Accounts for Railroad Companies, 49 C.F.R. Part 1201. *Id.* The report also states any material exceptions that came to the attention of the accountants during the examination. *Id.* The Board actively monitors the accountant's reports and can take action if a railroad misreports. (NPRM at 5 n.9.)

II. THE BOARD SHOULD NOT PROLONG THIS PROCEEDING TO DEVELOP A REPORTING REQUIREMENT FOR SPECULATIVE PTC BENEFITS.

ACC/CI argue that the Board's proposal is deficient because it does not require reporting of PTC benefits. The Board, however, properly focused this proceeding on reporting PTC costs in the NPRM when it rejected an argument by PPG Industries that is indistinguishable from ACC/CI's argument. (NPRM at 5.) The Board's reasoning for not expanding the scope of this proceeding to include a reporting requirement for PTC benefits remains correct for several reasons.

First, railroads are currently incurring substantial costs to install PTC, while benefits of PTC are hypothetical, controversial, and will not accrue until sometime in the future, if ever. Requiring railroads to report data on PTC benefits years before PTC will be implemented is premature.

Second, the Board's proposal provides a straightforward and viable approach for capturing and reporting PTC cost information by integrating the PTC supplemental schedules into an existing, annual reporting process. On the other hand, how the Board would indentify, quantify, and report productivity gains that may or may not arise as a result of PTC investments is unclear, and ACC/CI's comments offer no practical suggestions on what the Board should require railroads to report.

ACC/CI's consultants suggest that PTC benefits could be "teased out" by comparing certain performance measures between segments with PTC installed and segments without PTC installed.[4] However, ACC/CI provide no explanation as to why the various performance measures they mention would accurately identify productivity gains attributable solely to PTC, and they do not suggest how to quantify any PTC-related performance differences into PTC benefits that would be reported in the R-1. Their difficulty in explaining how the R-1 reports could measure PTC improvements arises in part because the benefits are speculative and controversial at this time. In analyzing PTC costs and benefits, the Federal Railroad Administration excluded certain benefits because of uncertainties regarding whether and when such other benefits would accrue and the potential to achieve those benefits using alternative technologies at lower costs.[5] If the Federal Railroad Administration, the agency with authority over PTC implementation, doubts whether railroads will realize PTC benefits, the Board should not prolong this proceeding until the uncertainties surrounding PTC benefits are resolved.

As UP previously indicated, it would not object to a separate rulemaking in the future to address PTC benefits. Accordingly, UP urges the Board not to broaden and complicate this

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[4] ACC/CI Comments, Verified Statement of Thomas D. Crowley, et al. at 15.

[5] Federal Railroad Administration, Docket No. FRA-2008-0132, Notice No. 3, *Final Rule: Positive Train Control Systems, 49 CFR Parts 229, 234, 235 and 236*, 75 Fed. Reg. 2,598, 2,684 (Jan. 15, 2010).

proceeding by attempting to develop an accurate method for identifying, measuring, and reporting PTC benefits that will not occur until after PTC is implemented, if ever.

III. ACC/CI'S CLAIM THAT THE SUPPLEMENTAL PTC SCHEDULES WILL ALLOW RAILROADS TO OVER-RECOVER THEIR PTC COSTS IS BASELESS.

ACC/CI's claim that the PTC supplemental schedules will serve mainly as a pretext for railroad efforts to over-recover their PTC costs also has no merit. UP did not ask the Board to decide whether or how it would use the PTC cost data in regulatory proceedings. While the Board's proposal would ensure that PTC cost data would be available, it does not require its use. Whether or how PTC cost data are used will be determined in particular cases or in other proceedings, such as Ex Parte No. 681, *Class I Railroad & Financial Reporting – Transportation of Hazardous Materials* (STB served Jan. 5, 2009). (NPRM at 4 n.8.) Interested parties will have the opportunity to raise issues regarding proper recovery of PTC costs in those cases or proceedings. Furthermore, as the Board recognized, railroads are already free to propose adjustments in an attempt to recover specific PTC costs in individual cases.

CONCLUSION

UP strongly supports the Board's proposal to adopt new reporting requirements for PTC expenditures with the minor modifications proposed by UP in its Opening Comments. ACC/CI's comments in opposition offer no valid reason for the Board to refrain from or delay adopting PTC supplemental schedules. Therefore, the Board should promptly amend its reporting rules.

Respectfully submitted,

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